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Torts--Wrongful Death--Liquor Vendor Not Liable Through Sales of "Nonintoxicating" Beer for Torts of Intoxicated Vendee

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reach the conclusion that in West Virginia the entire fee is liable to sale for nonpayment of taxes by the life tenant.

Since the past and present statutory provisions, under which a lien attaches to real property for the taxes assessed thereon, are similar in wording and have the same effect, several cases construing the earlier provision can be cited to support the conclusion that the entire fee will be sold for nonpayment of taxes. In *State v. Mathews*, 68 W. Va. 89, 69 S.E. 644 (1910), the court held that the failure of the holder of the freehold estate to pay the taxes, or to keep the land on the assessor's books, will render the entire estate in the land liable to be sold, or to become forfeited. In the same case, the court announced that the full value of the land in fee is assessed for taxation against such freeholder, and the payment of taxes by him protects from sale and forfeiture the estate in reversion or in remainder. *Taylor v. Taylor*, 76 W. Va. 469, 85 S.E. 652 (1915), is in accord with the proposition that payment by the life tenant enures to the benefit of the remainderman.

In conclusion, from a review of the authority, it would appear that a different and, it is submitted, better result would be reached in West Virginia. The state is empowered with a more efficient method of enforcement of taxation, the responsibility of registration is fixed and the buyer at the tax sale is protected.

J. F. W., Jr.

TORTS—WRONGFUL DEATH—LIQUOR VENDOR NOT LIABLE THROUGH SALE OF "NONINTOXICATING" BEER FOR TORTS OF INTOXICATED VENDEE.—P's testator was killed in an automobile accident caused by the negligent driving of V, who allegedly had become intoxicated as a result of drinking beer furnished by defendant tavern operator. By statute, the beer, being of four per cent alcoholic content, was a "nonintoxicating" beverage. P's action at law was instituted under the Iowa Dram Shop Act and on the basis of the common law liability of tavern operators. *Held*, that the Dram Shop Act is inapplicable to vendors of beer of less than four per cent alcoholic content by weight, and the common law does not regard an intoxicated tavern customer's torts as the natural consequence of the tavern operator's sale of liquor. *Cowman v. Hansen*, 92 N.W.2d 682 (Iowa 1958).

The Iowa Dram Shop Act provides: "Every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by an intoxicated person, or in consequence of the intoxication . . . of any person, shall have a right of action . . . against any person who shall, by selling . . . any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages." Dram Shop Act § 129.2, IOWA CODE ANN. ch. 129 § 129 (1954).

The decision in the principal case was based not only on the applicability of the Dram Shop Act to the defendant, but also upon the common law liabilities of tavern operators. Since the Dram Shop Acts have been adopted in several states, primarily to extend the common law liabilities of tavern operators, first consideration should be given to these common law definitions of tavern operators' duties.

There is a common law duty on a tavern operator to protect business guests from injuries resulting from the foreseeable negligence of intoxicated persons on the tavern premises. *Windorski v. Doyle*, 129 Minn. 402, 18 N.W.2d 142 (1945). The tavern operator need not be the vendor of the liquor furnished the intoxicated tortfeasor; however, he must have had actual or constructive notice of the danger posed by the intoxicated person on his premises. *Easier v. Downie Amusement Co.*, 125 Me. 332, 133 Atl. 905 (1926). The common law imposes no liability upon the vendor of liquor for damages to a vendee resulting from his intoxication, neither upon the theory that such sale was a direct cause of the injury, nor upon the theory of negligence. *Hitson v. Dyer*, 61 Cal. App.2d 803, 143 P.2d 803, 952 (1943). The vendee is denied recovery, first on the ground that the consumption, not the sale of the liquor was the proximate cause of the injury, *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889); and, second, on the theory that the vendee contributed to his own injury by voluntarily consuming the liquor. *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119 (1886).

In regard to injuries to third persons, such as in the principal case, it is held that a sale by the tavern operator could not be the proximate cause of such injury. *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939). It has been stated that "the act of selling liquor to an intoxicated minor was too remote to have been the proximate cause of an injury to a third person, even when the vendor knows

the minor was soon going to drive an automobile on a public highway." *Flickner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949). It is the negligent act of the purchaser in drinking the liquor that isolates the vendor from liability. *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450, 54 A.L.R.2d 1137 (1955).

In view of this authority, the defendant tavern operator in the principal case was absolved by the court of liability for the tort of his intoxicated customer which resulted in the death of the plaintiff's testator. As a result of such common law restrictions on the liability of tavern operators, several states have passed the Dram Shop Acts, all of them being comparable in form to the Iowa act noted above.

To make a tavern operator liable for the torts of his intoxicated customer under the Dram Shop Acts, the plaintiff must show that the intoxicating liquor was sold to the tort-feasor, that intoxication at least in part resulted from the sale, that such intoxication was the proximate cause of his injuries, that the plaintiff exercised due care for his own safety, and that he sustained injury. *Hill v. Alexander*, 321 Ill. App. 406, 53 N.E.2d 307 (1944). It is not necessary that the vendor have been reasonably able to foresee the negligent consequences of the intoxication of his customer, but only that the intoxication be the proximate cause of the injury. *Ibid.* Whether or not the person was in fact intoxicated is generally a question for the jury. *Shorb v. Webber*, 188 Ill. 126, 58 N.E. 949 (1900).

In the principal case, however, the beverage that the defendant's customer drank before he negligently caused the death of the plaintiff's testator was beer of four per cent alcoholic content by weight. The court held that the provisions of the Dram Shop Act were inapplicable because the Iowa legislature had specifically provided that beer of four per cent alcoholic content by weight, or less, was "nonintoxicating". IOWA CODE ANN. ch. 124 § 124.2 (1954).

It would seem beyond question that the court was on substantial ground in so holding. For where a statute is clear and free from ambiguity, there is no need for judicial construction, but only for strict adherence to the legislature's clear intent. *Mallory v. Jurgena*, 92 N.W.2d 387 (Iowa 1958); *Kelley & Moyers v. Bowman*, 68 W. Va. 49, 69 S.E. 546 (1910). Only when there are two possible constructions for a statute are courts at liberty to apply the rules of construction—the legislature being its own lexicographer. *Eysink*

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v. Board of Supervisors, 229 Iowa 1240, 296 N.W. 376 (1941); *Hasson v. City of Chester*, 67 W. Va. 278, 67 S.E. 731 (1910). Therefore, since the Iowa legislature had specifically made four per cent beer a "nonintoxicating" beverage, the court held that such beer was clearly outside the scope of liability intended to be imposed by the Dram Shop Act on vendors of *intoxicating* liquor. *Cowman v. Hansen*, 92 N.W.2d 682, 685 (Iowa 1958).

The court in the principal case, however, stated that it was not to be understood that "we are holding, as a matter of law, that four per cent beer is not intoxicating."

The question is then raised as to whether the West Virginia courts would hold that persons who may become intoxicated by drinking "nonintoxicating" beer could be convicted under the several statutes relating to offenses committed by intoxicated persons.

In the West Virginia Liquor Control Act, it is provided that beer of three and two-tenths per cent alcoholic content by weight, or less, is a "nonintoxicating" beverage. W. VA. CODE ch. 60, art. 1, § 5 (Michie 1955). In the same section it is also stated that the word alcoholic liquor shall include "alcohol, beer wine, and spirits, and any liquor or solid containing more than three and two-tenths per cent of alcohol by weight and capable of being used as a beverage." W. VA. CODE ch. 60, art. 1, § 7 (Michie 1955), further states that the "provisions of this chapter do not apply to nonintoxicating beer except as is otherwise specifically provided."

Under the same principles of statutory construction that controlled the decision in the principal case, it would seem that the offenses of drinking "alcoholic liquor in a motor vehicle on any highway, street, alley, or in a public garage," and of drinking "alcoholic liquor in a public place," would not be applicable to persons who were consuming only beer of three and two-tenths per cent alcoholic content. W. VA. CODE ch. 60, art. 6, § 9 (Michie 1955).

However, in the same chapter, W. VA. CODE ch. 60, art. 6, § 9 (Michie 1955), it is also made an offense to "appear in a public place in an intoxicated condition." Could a person be convicted hereunder when intoxicated by drinking only three and two-tenths per cent beer, in view of the provision in the same chapter that the "provisions of this chapter do not apply to nonintoxicating beer

except as is otherwise specifically provided"? W. VA. CODE ch. 60, art. 1, § 7 (Michie 1955). Another question is posed by W. VA. CODE ch. 8, art. 4, § 10 (Michie 1955), which makes it an offense to drive or operate a motor vehicle while intoxicated.

It has been held that intoxicating liquor includes and means any liquor intended for use, or capable of being used, as a beverage, which contains sufficient alcohol to produce some degree of intoxication when consumed in a quantity which may practically be drunk. *Franz v. State*, 156 Neb. 587, 57 N.W.2d 139 (1953). In considering proof of intoxication, the courts have also held that it is not necessary to show that the liquor served was intoxicating, but that the result that follows the drinking is much more satisfactory proof of the character of the drink. *Kennedy Bros. v. Sullivan*, 34 Ill. App. 46, 26 N.E. 382 (1889).

W. VA. CODE ch. 17C, art. 5, § 2a (Michie Supp. 1958), provides for chemical analysis of the blood of persons charged criminally with driving motor vehicles on the highways of the state while under the influence of intoxicating liquor, the results thereof showing fifteen-hundredths of one per cent of alcohol in the blood being prima facie evidence of intoxication. Moreover, in 1. J. FOR. SCI. 44 (1956), it is pointedly stated that:

"Whenever I have performed experiments to determine the effects of alcohol I have always been surprised at the large amounts of alcohol required to cause an alcoholic concentration of 0.15 per cent, usually 4 ounces of absolute alcohol or more. Even more surprising are the findings in the average person suspected of being intoxicated. Their 'only two bottles of beer' (about one ounce alcohol) have mysteriously shot the percentage of blood alcohol to about 0.30 per cent."

On the basis of these scientific tests, even without considering the statement regarding "only two bottles of beer", a person who had consumed a sufficient quantity of the beverage to include a total of four ounces of alcohol would, under the West Virginia chemical blood test, appear to be in an intoxicated condition. Could such person then be convicted of "drunken driving," or of "appearing intoxicated in a public place", if it were shown that "nonintoxicating" beer only had been consumed?

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It has been held by some courts that whatever might have been the behavior of a person who had illegally been sold "nonintoxicating" beer, if a statute specifically made such beverage "nonintoxicating," it was *not* an intoxicating drink. *Beck v. Groe*, 245 Minn. 28, 70 N.W.2d 886 (1955). It is submitted, however, that the decision in the *Kennedy Bros.* case is the better reasoned approach to the problems incident to statutes relating to "drunken driving" and similar offenses—that the result which follows the drinking is the most satisfactory proof of the intoxicating qualities of the drink and is the only necessary proof. *Kennedy Bros. v. Sullivan*, 34 Ill. App. 46, 26 N.E. 382 (1889).

L. B. S.